

**BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION**

**INQUIRY CONCERNING A
JUDGE, NO. 01-244
CHARLES W. COPE**

CASE NO.: SC01-2670

**IN LIMINE MOTION TO EXCLUDE ALL EVIDENCE PERTAINING
TO JUDGE COPE'S ALLEGED STATEMENTS MADE TO
COUNSELORS IN HANLEY- HAZELDEN AND MOTION FOR SANCTIONS**

The Honorable Charles W. Cope, through his undersigned counsel, moves this Commission to exclude all evidence pertaining to Judge Cope's alleged statements made to counselors in Hanley-Hazelden. Judge Cope further requests this Commission to enter sanctions against Special Counsel for violating this Commission's order regarding the scope of permissible discovery. In support of this requested relief Judge Cope states the following:

1. This Commission on June 11, 2002, entered an order sealing the confidential medical records of Judge Cope that are in the possession of the Investigative Panel (Exhibit "A" attached hereto). This Commission in a hearing on Judge Cope's Motion for Protective Order to prevent the depositions of two of Judge Cope's counselor's at Hanley-Hazelden regarding two alleged incriminating statements of Judge Cope referenced in the sealed medical records, barred the use of the medical records for any purpose in this proceeding with the following exception: Special Counsel could use for the sole purpose of refreshing the deponent's recollection only that page of the medical record written by that deponent which referenced the alleged statement of Judge Cope. Special Counsel's deposition of the two counselors was also limited solely to an inquiry into the two alleged incriminating statements.

3. Prior to the deposition, Special Counsel provided copies of the pertinent pages to the deponents. During their depositions both deponents testified in direct examination that they did not have a recollection of Judge Cope making the alleged statements referenced in their reports. Special Counsel then presented them with the previously provided pages of their report for the purported purpose of refreshing their recollection. Though both testified that the report refreshed their recollection, on cross-examination it was established that the witness was merely testifying from the report and that they, in fact, did not have their present recollection refreshed. In fact, both individuals admitted that the alleged statements of what Judge Cope referenced in their medical records could have resulted from a misunderstanding of what Judge Cope had told them and/or that the reference to the alleged statement was just plain erroneous. For example, though one medical record stated that Judge Cope was found wandering, the author of such record admitted that it was possible that Judge Cope had told him that he was arrested for and/or charged with wandering. Furthermore, on cross-examination it was established that the means by which the medical reports were ultimately created were inherently untrustworthy. For example the male counselor testified that his record was created after the fact based on his abbreviated notes and memory. The notes have since been destroyed and therefore the validity of the transference of information from the notes cannot be verified. The female counselor said her report was based on handwritten notes which she took during the interview of Judge Cope. This counselor amazingly testified that when she takes notes she writes them in complete sentences detailing everything that is said by

the patient. Such contention does not pass the laugh test and, of course, her notes have also been destroyed, thereby preventing any verification of the accuracy of the transfer of information.

4. In addition this woman had a heavy Hispanic accent and admitted English was her second language. She also amazingly denied she had an accent and admitted she could have made a mistake in her report about what Cope assertedly told her. This inherent unreliability of both her notes (which are destroyed) and her report is conclusively established by the following statement that is contained in the report:

The patient indicated that in April of this year he was involved in a case where he was arrested and charged with disorderly conduct related to him been [sic] intoxicated and showing up at a house where he had attended a party the night before the arrest. The home owners called the police and he was arrested. The patient denied displaying any inappropriate behavior other than knocking at the door in that house [sic].

The witness has admitted that Judge Cope was not intoxicated, delusional or hallucinating at the time of her interview of him, hence it is clear that Judge Cope would have never stated that (a) he went to a party at the location the night before, (b) that the location was a home, as opposed to a hotel room, (c) that he was arrested for disorderly conduct, and (d) that he knocked on the door of such house.

5. In addition to the foregoing, Special Counsel in the depositions intentionally violated the Chair's ruling regarding permissible discovery in such depositions. Special Counsel did such by asking questions concerning Judge Cope's statements to such counselors which were not in any way associated with the two alleged admissions of Judge Cope. For example, though neither of the alleged admissions related to the issue of "black outs," Special Counsel over the objection of Judge Cope's counsel made inquiries into Judge Cope's statements regarding such issue.

MEMORANDUM OF LAW

The law is well settled that "[I]f after seeing the document or object [intended to refresh the witness' recollection]. . . the witness does not have a present recollection of the fact, the witness may not testify to the fact." Ehrhardt, Charles, Florida Evidence sec. 613.1, p. 557-58 (West 2001 ed.). Accord, K.E.A. v. State, 802 So.2d 410 (Fla. 3d DCA 2001). In the instant case, the witnesses' admissions that the statement contained in their report may be an erroneous representation of Judge Cope's statements establishes that the witnesses did not have a present recollection of Judge Cope making such alleged statements. Accordingly, such witnesses are precluded under the Florida Rules of Evidence from testifying as to such alleged statements.

In addition to the witnesses' inability to testify as to such matters because of their failed recollection, the law is also well settled that the witnesses' inability to recollect the matter at issue does not permit Special Counsel to admit the records at issue into evidence as "refreshed recollection" or as "past recollection recorded." The court in Dade County Public Health Trust v. Parker, 551 So.2d 532 (Fla 3d DCA 1989), in addressing an almost identical issue held:

The fact that the hospital employees testified at trial and professed a lack of memory concerning the subject accident did not, as urged, allow the trial court to admit these reports as “refreshed recollections” [sec. 90.613, Fla. Stat. (1981)] or as “past recollection recorded” [sec. 90.803(5), Fla. Stat. (1981)]. The above statutory exclusion prohibits the admission at trial of the hospital incident reports . . . The fact that these incident reports might otherwise have been admissible under general provisions of the Florida Evidence Code, absent the statutory exclusion, cannot change this result, else the exclusion would be rendered meaningless as not changing the general rules of evidence in Florida.

551 So.2d at 533. In the instant case, the medical records are confidential and privileged. In acknowledgment of such this Commission has sealed such records and prohibited their use by Special Counsel, with the sole exception being for the two record excerpts to be used in an effort to refresh the recollection of the deponent in discovery. Such effort failed and Special Counsel is otherwise prohibited from using such records in these proceedings per prior rulings of this Commission and the Parker decision.

In summary: the witnesses from Hanley-Hazelden are incompetent to testify as to any alleged statements made by Judge Cope during the course of treatment at Hanley-Hazelden; the statements contained in such records are admittedly unreliable; and Special Counsel is precluded

under the prior ruling of this Commission and the above referenced authority from attempting to otherwise use the medical records as evidence in this cause. Accordingly, this Court should enter an order excluding all evidence pertaining to Judge Cope's alleged statements made to counselors in Hanley-Hazelden.

In addition this Commission should sanction Special Counsel's contemptuous violation of this Commission's ruling concerning the permissible scope of inquiry in taking the Hanley-Hazelden counselor's depositions.

WHEREFORE Judge Cope respectfully requests this Court to enter and order excluding from the final hearing any and all evidence pertaining to Judge Cope's alleged statements made to counselors in Hanley-Hazelden. Judge Cope further requests this Commission to enter an order imposing sanctions against Special Counsel for violating this Commission's order regarding the scope of permissible discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. Mail to: **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32302; **John S. Mills, Esq.**, Special Counsel, Foley & Lardner, 200 Laura Street, Jacksonville, Florida 32201-0240; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the

Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100,
Tampa, Florida 33602, this 23rd day of June, 2002.

ROBERT W. MERKLE, ESQ.